No. 80-420

In the Supreme Court of the United States

OCTOBER TERM, 1980

LARRY C. FLYNT, ET AL., PETITIONERS

v.

STATE OF OHIO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will address the following question:

Whether the prosecution of petitioners as a test case constitutes an impermissible selective prosecution.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the selective prosecution issues presented by this case. Such claims are frequently made with regard to federal prosecutions and enforcement proceedings, particularly in cases involving tax, draft, and census protestors, and others who claim that their unlawful activities are constitutionally protected. In addition, in the exercise of prosecutorial discretion, the United States and various federal regulatory agencies have often initiated "test cases" as a means of conserving and efficiently allocating prosecutorial resources. The determination of the proper burden of proof in and the elements of a selective prosecution claim are thus important issues potentially affecting numerous federal proceedings.

JURISDICTION

The United States believes that there is a substantial question regarding the Court's jurisdiction to hear this case. 28 U.S.C. 1257(3) empowers the Court to review by writ of certiorari "[f]inal judgments or decrees rendered by the highest court of a State." Here, however, although the decision below finally determines the federal question presented by petitioners, the case is interlocutory in nature. The Ohio Supreme Court has remanded the case for trial. If petitioners are acquitted at trial, this Court need not determine the selective prosecution issued raised by petitioners. If, on the other hand, petitioners are convicted and their convictions affirmed, they may raise all of their federal questions, including the issue of obscenity, for review by this Court at that time.

To be sure, this Court has construed Section 1257 flexibly, and, particularly in First Amendment cases involving issues of general applicability to the press, it has on several occasions undertaken review of cases

in an interlocutory phase. See *American Export Lines, Inc.* v. *Alvez*, 446 U.S. 274, 277-279 (1980); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476-487 (1975); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 246-274 (1974); *Mills* v. *Alabama*, 384 U.S. 214, 217-218 (1966). But "[i]n most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date." *Cox Broadcasting Corp.* v. *Cohn*, *supra*, 420 U.S. at 477.*

STATEMENT

1. In July 1976, petitioners were arrested on misdemeanor charges of pandering obscene materials, in violation of Ohio Rev. Code Ann. § 2907.32 (Page 1979 Supp.). Prior to trial, petitioners moved to dismiss the complaint on the ground that the prosecutor in Cuyahoga County had impermissibly selected the publishers and editors of *Hustler* magazine for prosecution while not prosecuting the officials of allegedly

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*We further note that the First Amendment issue presented at this stage of the present case is qualitatively different from those found to support a conclusion of finality in such cases as *Cohn* and *Tornillo*. In those cases, publishers were challenging the validity of state statutes of general application with a direct and continuing impact on speech activities, and the Court accordingly perceived a commanding need to provide a prompt ruling after final state court disposition of the federal claim. Here, by contrast, the First Amendment component of petitioners' equal protection claim—that they were improperly selected for prosecution because of publication of a political cartoon—turns upon an isolated historical fact. Far from implicating broad-based First Amendment interests of the press generally, the claim that other publishers are *not* being prosecuted does not require the immediate attention of this Court in order to protect federal interests that could be adversely affected by awaiting the outcome of petitioners' trial.

similar magazines such as *Club*, *Oui*, *Playboy* and other publications. Petitioners asserted that these other magazines had been distributed openly in Cuyahoga County for a longer period of time than had *Hustler*, and that their content was indistinguishable from the content of *Hustler*. Petitioners claimed that the case against them constituted an impermissible selective prosecution violating their rights under the Equal Protection Clause of the Fourteenth Amendment.

On February 28, 1977, a hearing was held in the Cleveland Municipal Court regarding petitioners' motion to dismiss. The prosecutor testified that although there had been other pornography prosecutions involving materials similar to *Hustler* (A-40, A-43 to A-45, A-48 to A-50, A-54, A-57, A-80 to A-82, A-109), *Hustler* "was the first one we went after that was nationally distributed, and was a second class mailing privilege type magazine" (A-57; see A-85). Acknowledging that he had made the decision to prosecute petitioners, the county prosecutor further stated that other nationally distributed magazines had been investigated, and that he would be inclined to prosecute those publications if this prosecution were successful (A-85 to A-86, A-89 to A-92, A-102 to A-105). He added, however, that his superiors, who were also waiting to see the results in this case, were currently discussing future prosecutions, and that they, rather than he, would make any decision to initiate future prosecutions in this area because this prosecution had involved an unusually large amount of time and publicity (A-85 to A-86, A-96 to A-98, A-102 to A-105).

The prosecutor also explained, without contradiction, why he had selected *Hustler* as a test case. He observed that the July 1976 issue of *Hustler* had been

the subject of several public complaints and that an anonymous person had sent a copy of that issue to the authorities (A-55 to A-60; see also A-124 to A-125). He acknowledged that some of the public's complaints had focused on a particular cartoon depicting various political figures engaging in sexual acts with the Statute of Liberty, but he testified that he had prosecuted petitioners despite and not because of that cartoon, which he believed to be constitutionally protected (A-55 to A-60, A-67). The prosecuting attorney also suggested that in his view *Hustler* was more offensive and vulgar than the other nationally distributed magazines with which he was familiar (A-89 to A-92). Finally, the prosecutor stated that he had chosen *Hustler* because it is an Ohio corporation and its officers were therefore readily available for prosecution in Ohio (A-109 to A-114). He noted that a prosecution for pandering obscene materials was a misdemeanor and not a felony, and that, as far as he was aware, he could not seek interstate rendition of persons residing outside Ohio to stand trial on misdemeanor charges (*ibid.*).

2. On May 17, 1977, the trial court granted petitioners' motion to dismiss (Pet. App. 36a-39a).[1] The court stated that this prosecution was the first of its kind and "that no other similar prosecution had been initiated either prior or subsequent to the charges filed in this case" (*id.* at 38a). Although generally accepting the prosecutor's testimony (*id.* at 37a, 39a), the court held as a matter of law that the prosecution of petitioners violates the Equal Protection Clause because the authorities had failed to initiate prosecutions against other magazines that are similar in content. The court stated that "[i]t is

[1] The court had previously ruled that the Ohio obscenity statute was valid and that the two issues of *Hustler* in question are obscene (A-36).

legally insufficient for the City to argue that it is awaiting the result of this case to determine its further course of action" (*ibid.*).

3. On the State's appeal, the Ohio Court of Appeals reversed (Pet. App. 19a-33a). The court first observed that although there had been two other prosecutions and various investigations of materials similar to *Hustler*, the state prosecutors were not actively prosecuting all magazines comparable to *Hustler* (*id.* at 21a-23a). The court noted, however, that mere selectivity in enforcement does not violate the Equal Protection Clause and that petitioners had the heavy burden of demonstrating intentional and invidious discrimination (*id.* at 25a-29a). The court specifically concluded that test cases are appropriate so long as the prosecutor intends generally to enforce the law against other similarly situated "offenders" if the test case proves successful (*id.* at 28a-29a).

Applying these standards to this case, the court of appeals concluded that petitioners had sufficiently established that this prosecution is a test case and that the prosecutor had not yet prosecuted other magazines that he knew to be similar in format to *Hustler* (Pet. App. 29a). The court further found that the selection of *Hustler* was not based on invidious or impermissible grounds. In particular, the court determined that although public reaction to the political cartoon had, in part, brought the magazine to the prosecutor's attention, that cartoon was not the basis of the prosecution (*id.* at 29a). Rather, the prosecutor had selected *Hustler* because it was more offensive than other similar magazines and because *Hustler's* officers are domiciled in Ohio (*id.* at 29a-30a). Noting that the respondent was considering future prosecutions against similar magazines (*id.* at 23a-24a, 30a-31a), the court held that petitioners had not proved "that *Hustler* alone would be prose-

cuted, much less that this selectivity was based on constitutionally prohibited discrimination" (*id.* at 31a). The court indicated that petitioners should have presented the testimony of those responsible for future prosecutorial policy in this area (*id.* at 31a-32a).

4. In a per curiam opinion, the Ohio Supreme Court affirmed, with one judge dissenting (Pet. App. 1a-18a). The court emphasized that "conscious exercise of some selectivity in enforcement is not in itself * * * a violation of the United States Constitution" (*id.* at 5a). The court explained that in order to establish a selective prosecution claim, a defendant has a heavy burden of proving that others similarly situated have not been prosecuted and that the exercise of prosecutorial discretion is based on invidious or impermissible factors (*id.* at 6a-7a). The court found that here the testimony showed that the test case against *Hustler* was predicated on appropriate considerations, including *Hustler's* relative offensiveness and the in-state domicile of petitioners (*id.* at 7a-8a). In addition, the court determined that petitioners had not established that *Hustler* alone would be prosecuted (*id.* at 9a).

SUMMARY OF ARGUMENT

Petitioners contend that an otherwise valid state prosecution against them should be dismissed because it constitutes an impermissible selective prosecution. It is well settled, however, that the conscious exercise of selectivity in enforcement matters does not by itself violate the Equal Protection Clause of the Fourteenth Amendment. Rather, petitioners have a heavy burden of establishing that others similarly situated have not been and will not be prosecuted and that the selection of them for prosecution is deliberately based

upon an unjustifiable criterion such as race, religion, or other invidious classification. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 124-125 (1979); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962). Petitioners' allegations and proof fall far short of the mark.

First, as the court below concluded, petitioners have not demonstrated that similar offenders will not be charged by respondent in the future. To be sure, the state prosecutor candidly admitted that this prosecution was a test case against a nationally distributed magazine with second-class mailing privileges. He further stated, however, that he would be willing to prosecute other similar magazines if this prosecution were successful and that such prosecutions were currently being considered by his superiors. Thus, even assuming that petitioners' magazine cannot be distinguished from other periodicals, the evidence shows that petitioners are merely the first to be prosecuted, and not that they will necessarily be the only persons among similarly situated offenders to be charged. Such a bona fide use of a test case in order to secure a definitive legal ruling while conserving prosecutorial resources does not offend the Equal Protection Clause. See, *e.g.*, *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413-414 (1958); *MacKay Telegraph & Cable Co.* v. *Little Rock*, 250 U.S. 94 (1919).

Moreover, the prosecution of petitioners for pandering obscene materials was not predicated on any invidious or impermissible factor. Petitioners erroneously suggest that they were charged because they published a constitutionally protected political cartoon in the magazine issue in question. But the evidence on which petitioners rely shows only that some of the members of the public who made complaints about

petitioners' magazine expressed their distaste for that cartoon. Petitioners did not demonstrate, however, that the apparent motivation of some of the private citizens who reported or complained about petitioners' alleged crime could appropriately be attributed to the State's decision to prosecute. To the contrary, the uncontradicted testimony of the prosecuting attorney makes clear that this prosecution was initiated despite and not because of that cartoon. Furthermore, petitioners may not be heard to complain because their purposeful illegal activities have achieved greater notoriety than other alleged offenders. Particularly in the context of obscenity, which concerns community standards, prosecutorial decision-making may be based on public disapproval and concern.

Finally, even if petitioners sufficiently established a prima facie case of selective prosecution, the prosecuting attorney's testimony overwhelmingly rebutted their claim. As indicated above, petitioners' magazine was the subject of several public complaints. The prosecutor accordingly investigated the object of those complaints as well as other allegedly similar magazines. He then determined to prosecute petitioners' magazine as a test because he considered it to be more offensive than other magazines—in other words a more serious breach of the law. In addition, the prosecutor observed that *Hustler* is an Ohio corporation and that its officers are domiciled in Ohio and readily subject to prosecution, whereas other nationally published magazines are headquartered outside the State. Because no invidious or impermissible factor was thus the "but for" cause of petitioners' prosecution, the Ohio Supreme Court correctly declined to dismiss the charges against petitioners. See *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 285-287 (1977).

ARGUMENT

THE PROSECUTION OF PETITIONERS AS A TEST CASE WAS NOT INVIDIOUSLY BASED AND DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

A. Petitioners Have A Heavy Burden of Establishing That The State's Exercise Of Prosecutorial Discretion Constitutes An Impermissible Classification

1. *Introduction.* This case concerns the constitutional limitations on the exercise of prosecutorial discretion. Although both state and federal prosecutors are unquestionably subject to constitutional constraints, they have traditionally enjoyed wide ranging discretion regarding whether to prosecute, what charges to bring, and when to bring them. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 123-125 (1979); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868).[2] This extremely broad rule of judicial deference is designed to ensure prosecutorial independence and flexibility and reflects "the manifold imponderables which enter into the prosecutor's decision to prosecute or not to prosecute." *Inmates of Attica Cor-*

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[2] Indeed, in the federal system, a prosecutor's decision not to bring criminal charges is not subject to judicial review at all. See *United States* v. *Nixon, supra*, 418 U.S. at 693; *Confiscation Cases, supra; United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965). See also *Butz* v. *Economou*, 438 U.S. 478, 515 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409, 438 (1976) (White, J., concurring); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 618-619 (1973). But cf. *National Black Police Ass'n* v. *Velde*, 631 F.2d 784 (D.C. Cir. 1980) (administrative prosecutor may be personally liable for failing to initiate suit), petition for cert. pending, No. 80-1074.

rectional Facility v. *Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973). See, *e.g.*, *Bordenkircher* v. *Hayes*, *supra*, 434 U.S. at 364-365; *United States* v. *Lovasco*, 431 U.S. 783, 793-796 (1977); *Imbler* v. *Pachtman*, 424 U.S. 409, 424-426 (1976); ABA Project on Standards for Criminal Justice, *The Prosecution Function and The Defense Function* § 3.9 (Approved Draft, 1971). As Chief Justice (then Judge) Burger has observed (*Newman* v. *United States*, 382 F.2d 479, 480 (D.C. Cir. 1967)), "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought."

Moreover, even if feasible, sweeping judicial supervision of the prosecutorial function would interfere with the administration of justice, and, at least in the federal system, would run afoul of the separation of powers doctrine. See *United States* v. *Nixon*, *supra*, 418 U.S. at 693; *Confiscation Cases*, *supra*; *United States* v. *Torquato*, 602 F.2d 564, 569 (3d Cir. 1979); *Inmates of Attica Correctional Facility* v. *Rockefeller*, *supra*, 477 F.2d at 379-380; *United States* v. *Bland*, 472 F.2d 1329, 1335 (D.C. Cir. 1972); *United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965). Many defendants could with relative ease make selective prosecution claims in an attempt to delay and derail bona fide prosecutions and to discover details of the prosecutor's case prior to trial. If a prosecutor were required to defend every charging decision, processing even frivolous challenges to the exercise of prosecutorial discretion would involve substantial judicial and prosecutorial resources. Furthermore, strict ju-

dicial scrutiny of prosecutorial decision-making might well compel prosecutors to adopt excessively rigid prosecutorial policies in lieu of the traditionally flexible approach to these matters that has previously served the public interest. See, *e.g.*, *United States* v. *Lovasco*, *supra*, 431 U.S. at 794-795; Breitel, *Controls in Criminal Law Enforcement*, 27 U. Chi. L. Rev. 427 (1960); Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 Colum. L. Rev. 1103, 1119-1120 (1961).

At the same time, extensive judicial scrutiny of prosecutorial decision-making would not sufficiently add to the protections against prosecutorial overreaching already enjoyed by defendants to justify its manifest costs. Cf. *FTC* v. *Standard Oil Co. of Cal.*, No. 79-900 (Dec. 15, 1980), slip op. 12-14. Both the jury and the trial judge make independent determinations regarding the merits of a particular prosecution and thus act as substantial checks on the prosecutor. See *United States* v. *Batchelder*, *supra*, 442 U.S. at 125; *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 427. See also *Butz* v. *Economou*, 438 U.S. 478, 515-517 (1978). Furthermore, a criminal conviction may be reviewed in appropriate appellate and collateral proceedings. See *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 427. See also *FTC* v. *Standard Oil Co. of Cal.*, *supra*, slip op. 12-14. In addition, a corrupt or invidious prosecutor is amenable to professional discipline and criminal liability, and may be directly or indirectly accountable to the electorate. See *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 429.

2. *Equal Protection Limitations.* For the foregoing reasons, this Court has repeatedly accorded a great deference to the prosecutor's decision to charge a defendant. See, *e.g.*, *United States* v. *Batchelder*, *supra*; *Bordenkircher* v. *Hayes*, *supra*; *Oyler* v. *Boles*,

368 U.S. 448, 456 (1962); *Rosenberg* v. *United States*, 346 U.S. 273, 294 (1953) (Clark, J., concurring). To be sure, the Equal Protection Clause imposes limits on the exercise of prosecutorial discretion. But "the Fourteenth Amendment guarantees equal laws, not equal results." *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256, 273 (1979). See, *e.g.*, *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-265 (1977); *Washington* v. *Davis*, 426 U.S. 229, 242 (1976); *Akins* v. *Texas*, 325 U.S. 398, 404-405 (1945). Accordingly, a prosecutor's inadvertent disparity in treatment of similarly situated offenders does not violate the Equal Protection Clause. *Oyler* v. *Boles*, *supra*, 368 U.S. at 456. Furthermore, " 'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.' " *Bordenkircher* v. *Hayes*, *supra*, 434 U.S. at 364, quoting from *Oyler* v. *Boles*, *supra*, 368 U.S. at 456. See, *e.g.*, *United States* v. *Batchelder*, *supra*, 442 U.S. at 123-125 & n.9; *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944).

Thus, in order to establish a discriminatory prosecution claim, the defendant must demonstrate that the prosecutor has purposefully determined to prosecute him without intending to prosecute other similarly situated offenders, and that this intentional and knowing selection is based on invidious or impermissible factors. See, *e.g.*, *Oyler* v. *Boles*, *supra*; *United States* v. *Niemiec*, 611 F.2d 1207, 1209 (7th Cir. 1980); *United States* v. *Catlett*, 584 F.2d 864, 865-866 (8th Cir. 1978); *United States* v. *Kahl*, 583 F.2d 1351, 1353-1354 (5th Cir. 1978). As in other equal protection contexts, the official act of initiating

a prosecution is entitled to a presumption of regularity, and the defendant, as the allegedly aggrieved party, bears the heavy burden of pleading and proving that the otherwise valid charges are the product of intentional and invidious discrimination. See, *e.g.*, *Mobile* v. *Bolden*, 446 U.S. 55, 66-67 (1980) (plurality opinion); *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-265 (1977); *Oyler* v. *Boles*, *supra*; *Snowden* v. *Hughes*, *supra*; *United States* v. *Ojala*, 544 F.2d 940, 943 (8th Cir. 1976); *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974).

Finally, if the defendant meets this burden and establishes a prima facie case of discriminatory prosecution, the burden then shifts to the State to rebut this evidence and to show that the impermissible factor is not the "but for" cause of the prosecution. See *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 320-321 n.54 (1978) (opinion of Powell, J.); *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 285-286 (1977); *Washington* v. *Davis*, *supra*, 426 U.S. at 241; *United States* v. *Falk*, 479 F.2d 616, 620-621 (7th Cir. 1973); *United States* v. *Crowthers*, 456 F.2d 1074, 1078 (4th Cir. 1972). See also *Parker* v. *North Carolina*, 397 U.S. 790, 796 (1970); *Wong Sun* v. *United States*, 371 U.S. 471, 491 (1963). As we now demonstrate, application of these standards to this case compels the conclusion that petitioners' claims are insubstantial.

B. A Prosecutor May Randomly Select One Of Several Similarly Situated Offenders As A Test Case

1. The trial court dismissed petitioners' prosecution solely because "no other similar prosecution had been initiated either prior or subsequent to the

charges filed in this case" (Pet. App. 38a). In the trial court's view, "[i]t is legally insufficient for the City to argue that it is awaiting the result of this case to determine its further course of action" (*id.* at 39a). In other words, the trial court held that a prosecutor may not in good faith select a test case among similarly situated offenders, while holding other similar prosecutions in abeyance pending the results in the test case. Neither logic nor precedent supports this conclusion. See, *e.g.*, *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251-252 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413-414 (1958); *Mackay Telegraph & Cable Co.* v. *Little Rock*, 250 U.S. 94, 100 (1919); *Cook* v. *City of Price*, 566 F.2d 699, 701 (10th Cir. 1977); *United States* v. *Leggett & Platt, Inc.*, 542 F.2d 655, 658 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977); *People* v. *Utica Daw's Drug Co.*, 16 A.D.2d 12, 225 N.Y.S.2d 128 (1962).

In many situations, application of the law to a class of potential offenders or to a particular type of activity may be uncertain. For example, the coverage of a newly enacted statute banning the sale of drug paraphernalia may be unclear as applied to the numerous vendors of pipes and cigarette papers. Or a law clear on its face and covering a multitude of persons or establishments, such as a Sunday "blue" law or a mandatory draft provision covering males only, may be of doubtful constitutionality. See *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582, 588-589 (1961); *Broad-Grace Arcade Corp.* v. *Bright*, 48 F.2d 348, 352 (E.D. Va.), aff'd per curiam, 284 U.S. 588 (1931). In short, a prosecutor will often have a good faith doubt whether the courts will ultimately uphold his legal theory or grant the relief he seeks. And in many of those cases,

his doubts will apply to a broad range of similarly situated persons or establishments. Likewise, a prosecutor may lack the necessary resources to prosecute all known offenders.

Where application of the law is thus uncertain or where the prosecutor is unable to prosecute all offenders at once, selection of a test case in order to obtain a definitive legal ruling and to deter future offenses is an appropriate and heretofore accepted prosecutorial strategy. See, *e.g.*, *Mackay Telegraph & Cable Co.* v. *Little Rock*, *supra*, 250 U.S. at 100; *Cook* v. *City of Price*, *supra*, 566 F.2d at 701; *People* v. *Utica Daw's Drug Co.*, 225 N.Y.S.2d at 136. If the test case proves unsuccessful either in result or in cost of prosecution, the prosecutor will not have unnecessarily expended limited judicial and prosecutorial resources on a series of unsuccessful cases, and numerous potential defendants will have been spared the time and expense of trial.[3] On the other hand, if the test case proves successful, other prosecutions may be unnecessary because many offenders will cease violating the now established rule of law. Indeed, where the class of offenders is extremely large or where each prosecution requires the expenditure of substantial prosecutorial resources, use of a publicized test case may be the only practical means of enforcing the law.[4]

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[3] After obtaining a conviction in a test case, a prosecutor could well determine that the unexpected duration and cost of such a proceeding greatly exceeded its social value. In these circumstances as well, the prosecutor's determination to decline further prosecutions would not violate the Equal Protection Clause. See Comment, *supra*, 61 Colum. L. Rev. at 1119-1120.

[4] For example, successfully enforcing a Sunday "blue" law against a large retailer would undoubtedly result in the subsequent closing of most retail establishments on Sundays.

Furthermore, even if additional prosecutions are required or warranted, the precedent established in the test case will undoubtedly facilitate subsequent proceedings and may well induce guilty pleas by offenders who would otherwise have litigated the previously unsettled point of law.

Accordingly, the courts have uniformly endorsed the use of test cases. In *Mackay Telegraph & Cable Co.* v. *Little Rock, supra,* for example, the defendant in a tax enforcement proceeding claimed that the selective enforcement of the tax provision in question violated its rights under the Equal Protection Clause, because the city had failed to prosecute two other cable companies. 250 U.S. at 100. This Court unanimously rejected this claim, observing that "the present action was a test case to determine whether the license fees were applicable * * * with the intent, in case of an affirmative answer, to enforce the general ordinance against the other companies in the same sense" (*ibid.*). See also, *e.g.*, *FTC* v. *Universal-Rundle Corp., supra; Moog Industries, Inc.* v. *FTC, supra; Cook* v. *City of Price, supra; United States* v. *Leggett & Platt, Inc., supra; People* v. *Utica Daw's Drug Co., supra.* Indeed, where the prosecutor intends generally to enforce the law upon successful completion of the test case, the defendant charged in that proceeding cannot meaningfully be said to have been treated differently from other members of his class for purposes of the Fourteenth Amendment. See *Personnel Administrator* v. *Feeney, supra,* 442 U.S. at 273; *Washington* v. *Davis, supra,* 426 U.S. at 245.

2. Petitioners contend (Br. 15, 20, 23) that their prosecution was not a bona fide test case. But the prosecuting attorney testified without contradiction that while petitioners' magazine "was the first one

we went after that was nationally distributed, and was a second-class-mailing-privilege type magazine" (A-57), he would be inclined to prosecute other similar magazines in the future if this prosecution were successful (A-85 to A-86, A-89 to A-92, A-102 to A-105). The prosecutor also candidly admitted that this prosecution involved substantially more time, cost, and publicity than previous prosecutions, and that his superiors, who were awaiting the results in this case, would make the determination to proceed with future prosecutions. Thus, as both the Ohio Court of Appeals (Pet. App. 31a) and the Ohio Supreme Court (*id.* at 9a) expressly concluded, petitioners, who bear the burden of proof, failed to establish that they alone would be prosecuted.[5] In the absence of unusual circumstances not present here, this Court should not review or disturb these concurrent factual findings of the lower courts. See, *e.g.*, *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

In our view, moreover, the facts of this case underscore the conclusion that test cases are both proper and necessary. The prosecutor selected one of perhaps as many as 75 nationally published, second-class-mailing-privilege magazines that follow formats and contain materials similar to those used in *Hustler* (A-83 to A-87). Prosecution of any of the publishers of these magazines involves substantially

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[5] Petitioners suggest (Br. 22-23, 25-29) that the trial court rejected the prosecutor's testimony regarding future prosecutions. To the contrary, however, that court generally accepted the prosecutor's testimony (Pet. App. 37a-38a, 39a), and it apparently accepted his testimony on this point, concluding only that "[i]t is *legally* insufficient for the City to argue that it is awaiting the result of this case to determine its further course of action" (*id.* at 39a; emphasis supplied).

greater expenditures of time and money than the prosecution of the distributors of more clearly obscene materials that had previously been undertaken by respondent (A-102 to A-103). If the community (*i.e.*, the jury) or the courts adjudged this kind of material to be constitutionally protected, further expensive prosecutions would be unwarranted. Alternatively, the prosecuting attorney anticipated that if this case were successful, further prosecutions might be unnecessary since at least one major magazine distributor, who had previously carried *Hustler* and other similar magazines, had indicated that he would cease distribution at that time (A-95). And even if further prosecutions were warranted and economically feasible, a definitive ruling of the Ohio courts that the Ohio statute could constitutionally be applied to magazines such as *Hustler* would undoubtedly simplify such prosecutions.

C. Petitioners Have In Any Event Failed To Prove That This Prosecution Was Motivated By Invidious Or Impermissible Factors

Even if it be assumed that this prosecution is not a bona fide test case and that respondent has no intent generally to enforce the law, petitioners' claim of discriminatory prosecution fails for still another reason—petitioners' failure to establish that the decision to prosecute was based on invidious or impermissible considerations, which is an essential element of a discriminatory prosecution claim. *United States* v. *Batchelder*, *supra*, 442 U.S. at 125 n.9; *Oyler* v. *Boles*, *supra*, 368 U.S. at 456; *Snowden* v. *Hughes*, *supra*, 321 U.S. at 8. See *Mobile* v. *Bolden*, *supra*, 446 U.S. at 66-67; *Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 264-265;

Washington v. *Davis*, *supra*.[6] Both the Ohio Court of Appeals and the Ohio Supreme Court[7] correctly determined that no such proof appears in this case (Pet. App. 7a-9a, 29a-31a).[8]

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[6] Every court of appeals has held that the defendant bears a heavy burden of establishing the prosecutor's improper or invidious motivation. See, *e.g.*, *United States* v. *Wilson*, Nos. 80-1255 and 80-1256 (9th Cir. Feb. 9, 1981), slip op. 313; *United States* v. *Diggs*, 613 F.2d 988, 1003 (D.C. Cir. 1979), cert. denied, No. 79-1343 (June 2, 1980); *United States* v. *Niemiec*, *supra*, 611 F.2d at 1209 (7th Cir.); *United States* v. *Torquato*, 602 F.2d 564, 568-569 (3d Cir. 1979); *United States* v. *Catlett*, *supra*, 584 F.2d at 866 (8th Cir.); *United States* v. *Johnson*, 577 F.2d 1304, 1308-1309 (5th Cir. 1978); *Cook* v. *City of Price*, *supra*, 566 F.2d at 701 (10th Cir.); *United States* v. *Leggett & Platt, Inc.*, *supra*, 542 F.2d at 658 (6th Cir.); *United States* v. *Bourque*, 541 F.2d 290, 292-293 (1st Cir. 1976); *United States* v. *Baechler*, 509 F.2d 13, 15 (4th Cir. 1974); *United States* v. *Berrios*, *supra*, (2d Cir.).

[7] The trial court made no contrary finding on this point, since in its view of the law, mere failure to prosecute other similarly situated offenders violates the Equal Protection Clause. See Pet. App. 39a.

[8] Indeed, at least as a matter of federal law, petitioners' conclusory and speculative allegations regarding the prosecutor's bad faith were insufficient to warrant even an evidentiary hearing. See, *e.g.*, *United States* v. *Diggs*, *supra*, 613 F.2d at 1003-1004; *United States* v. *Niemiec*, *supra*, 611 F.2d at 1207; *United States* v. *Torquato*, *supra*, 602 F.2d at 569-572; *United States* v. *Catlett*, *supra*, 584 F.2d at 865-866; *United States* v. *Union Nacional de Trabajadores*, 576 F.2d 388, 395 (1st Cir. 1978). As the Third Circuit recently explained: "In order to minimize the intrusion on the prosecutorial function [and the separation of powers considerations that underlie prosecutorial discretion] * * *, the defendant is obligated to make a threshold showing of discriminatory prosecution before an evidentiary hearing will be accorded on this issue. * * * The defendant bears the burden of * * * [adducing] [s]ome credible evidence * * * indicating that the

1. Petitioners argue (Br. 14, 20-22) that this prosecution was based on the authorities' and the public's adverse reaction to a constitutionally protected political cartoon in the July 1976 issue of *Hustler*. Again, however, the uncontradicted evidence does not support petitioners' factual claims. To be sure, some of the several private complaints made to the authorities about *Hustler* focused on the cartoon in question (A-55 to A-60, A-124 to A-125). But other private complaints, including the anonymous mailing of the entire July issue to the police captain in charge of the pornography unit, related to "the magazine in general" (A-125; see A-55 to A-60, A-124 to A-125). More important, the state's attorney unequivocally testified that following the police investigation into these complaints, he determined to charge petitioners despite and not because of that cartoon (A-59 to A-67). He further explained that he considered that cartoon to be protected speech (A-60; see *Papish* v. *Board of Curators*, 410 U.S. 667 (1973)), but that in his view the magazine as a whole is obscene (A-60-A-81).[9]

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government intentionally and purposefully discriminated * * *." *United States* v. *Torquato, supra*, 602 F.2d at 569-570. In this case, petitioners alleged only that "the present complaints * * * represents [sic] a calculated course of selected, discriminatory and unequal application and interpretation of Ohio law against the defendants, particularly the defendant Larry Flynt, designed to harass and oppress Flynt and the magazine 'Hustler'" (Pet. Consolidated Pretrial Motions and Memorandum, Point VII, at A-1).

[9] Petitioners boldly assert (Br. 20-21) that "[t]he Assistant Law Director had publicly stated that *Hustler's* publishers and editors had been chosen for prosecution as the result of the local citizens' disapproval of the cartoon." Petitioners apparently are referring to a television program in which the

Thus, the evidence adduced at the hearing on the motion to dismiss this prosecution demonstrates only that some of the private complainants may have had misguided or arguably improper motives in contacting the authorities. But, because the Equal Protection Clause solely condemns State action that is invidiously and intentionally discriminatory (see, *e.g.*, *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149, 166 (1978); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 172-177 (1972)), the factors that motivate private persons to call apparently illegal conduct to the attention of the authorities are simply irrelevant to the question whether the prosecution is invidiously or impermissibly motivated. Cf. *Dennis* v. *Sparks*, No. 79-1186 (Nov. 17, 1980), slip op. 4. It is inconceivable, for example, that the prosecution of a drug dealer should be dismissed merely because the neighbor who reported the dealer's illicit activities to the police did so for racial or other invidious reasons. In sum, petitioners failed to prove that the prosectuor initiated the charges against them because he sought to suppress their constitutionally protected political cartoon.

2. Petitioners also suggest that the prosecutor "impermissibly made citizen reaction the basis of his prosecution" (Br. 15; see *id.* at 21). It is both inevitable and desirable, however, that citizen com-

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prosecuting attorney was questioned about the *Hustler* prosecution. Petitioners did not introduce a transcript of that program into evidence. Moreover, the prosecutor explained that during the program he had "tried to clarify that [a cartoon complaint] is what started the police officers noticing that magazine; and I did admit 'yes,' somebody had made complaints about this cartoon, but that's not the reason we prosecuted" (A-59).

plaints regarding allegedly illegal conduct ordinarily result in official investigations. Furthermore, in allocating limited prosecutorial resources, it is ordinarily quite proper for a prosecutor to take into account whether the public has generally acquiesced in particular types of technically illegal conduct or whether it considers a particular crime to be especially offensive or harmful. See ABA Project on Standards for Criminal Justice, *The Prosecution Function and The Defense Function* § 3.9(b) (Approved Draft, 1971); Breitel, *supra*, 27 U. Chi. L. Rev. at 431-432. Indeed, as the prosecutor in this case indicated in his testimony before the trial court (A-102 to A-105), since the determination of obscenity vel non turns on "contemporary standards of the community" (*Smith* v. *United States*, 431 U.S. 291, 293 (1977), citing *Miller* v. *California*, 413 U.S. 15 (1973)), consideration of the public reaction to the prurient aspects of petitioners' magazine seems particularly appropriate.

Moreover, where prosecution of all potential offenders is not practical, a prosecutor may properly consider the public notoriety of a particular case in determining whether to prosecute. Enforcement of the criminal law is designed not only to punish, but also to deter. Hence, selection of a more notorious or publicized violation is likely to have a greater deterrent effect, and is thus a rational allocation of prosecutorial resources. *E.g.*, *United States* v. *Catlett*, *supra*, 584 F.2d at 868; *United States* v. *Johnson*, *supra*, 577 F.2d at 1309; *United States* v. *Ojala*, 544 F.2d 940, 944-945 (8th Cir. 1976); *United States* v. *Peskin*, 527 F.2d 71, 85-86 (7th Cir. 1975),

cert. denied, 429 U.S. 818 (1976); *United States* v. *Oaks*, 527 F.2d 937, 940 (9th Cir. 1975), cert. denied, 426 U.S. 952 (1976). Likewise, since a prosecutor always evaluates the strength of his case in considering a prosecution, the fact that an offender, such as a notorious tax protestor, has publicized and acknowledged the willful nature of his offense is obviously a relevant and permissible consideration for the prosecutor. *E.g.*, *United States* v. *Wilson*, *supra*, slip op. 315; *United States* v. *Scott*, 521 F.2d 1188, 1195 (9th Cir. 1975), cert. denied, 424 U.S. 955 (1976).[10]

3. Not only did petitioners fail to allege and prove that the prosecutor discriminated against them for invidious reasons, but the evidence affirmatively shows that he exercised his discretion on the basis of wholly appropriate considerations. In addition to the public complaints received regarding *Hustler* generally (see pages 19-21, *supra*), the prosecutor identified two substantial reasons why he selected that magazine rather than others that are arguably similar in content and format. First, the prosecutor stated that he considered *Hustler* to be more offensive than the comparable nationally published magazines of which he was aware (A-89 to A-92).[11] Insofar as

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[10] We further submit that insofar as petitioners did demonstrate that an impermissible factor played a substantial role in the decision to prosecute, the testimony of the prosecutor described below (pages 22-23) shows that this impermissible factor was not the "but for" cause of this prosecution. Accordingly, the Equal Protection Clause does not require dismissal of the charges against petitioner. *See, e.g.*, *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 320-321 n.54; *Mt. Healthy City School District Board of Education* v. *Doyle*, *supra*, 429 U.S. at 285-286; *Washington* v. *Davis*, *supra*, 426 U.S. at 241.

[11] This judgment is supported by the testimony of a police officer who stated that he noticed that only *Hustler* was

petitioners were thus honestly perceived as being engaged in a more flagrant violation of the law than other publishers, the prosecutor properly chose to prosecute them rather than their competitors. See, *e.g.*, *Cook* v. *City of Price*, *supra*, 566 F.2d at 701; *United States* v. *Oaks*, *supra*, 527 F.2d at 939-940; *United States* v. *Scott*, *supra*, 521 F.2d at 1195; Comment, *supra*, 61 Colum. L. Rev. at 1119 n.66. Moreover, since the Equal Protection Clause prohibits only purposeful discrimination, it does not matter that the prosecutor may have been mistaken in his belief regarding the relative offensiveness of *Hustler*, so long as that belief was bona fide. Likewise, it is irrelevant that petitioners can now show that the prosecutor did not bring charges against equally or even more offensive magazines of which he was unaware. *Oyler* v. *Boles*, *supra*; *The Supreme Court, 1961 Term*, 76 Harv. L. Rev. 54, 120-121 (1962).

Furthermore, the prosecutor explained that he focused on charging petitioners because *Hustler* is an Ohio corporation, and its officers and publishers were therefore readily prosecuted (A-109 to A-114). He observed that the obscenity charges were classified as misdemeanors and not felonies, and that, as far as he was aware, he could not seek extradition of out-of-state persons based on misdemeanor charges (*ibid.*). Thus, in deciding to charge the publishers of a nationally published, second-class-mailing-privilege magazine for the first time, the prosecutor reasonably determined that prosecution of an in-state publisher was most feasible.[12] Such a rational, ob-

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largely covered instead of being displayed in full view at the newsstand (A-136). See also *Penthouse Intern., Ltd.* v. *McAuliffe*, 610 F.2d 1353 (5th Cir. 1980).

[12] Petitioners did not allege or prove that other well known, nationally published magazines were headquartered in Ohio.

jective basis for prosecuting petitioners fully satisfies the Equal Protection Clause.[13]

CONCLUSION

The judgment of the Ohio Supreme Court should be affirmed.

Respectfully submitted.

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[13] Petitioners also contend (Br. 25-29) that the state appellate courts could not constitutionally reweigh the evidence previously evaluated by the trial court. In *United States* v. *Raddatz*, No. 79-8 (June 23, 1980), slip op. 9-12, however, this Court held that, consistent with the Due Process Clause, the ultimate fact-finder regarding a pretrial motion in a criminal case need not actually hear the witnesses. Here, moreover, the appellate courts made no factual findings contrary to those made by the trial court. Rather, those courts simply disagreed with the trial court's legal conclusions based on the undisputed evidence at the hearing.

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